

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DAVID B.,

Claimant,

vs.

ALTA CALIFORNIA REGIONAL
CENTER,

Service Agency.

OAH No. 2011020705

DECISION

This matter was heard before Administrative Law Judge Elaine H. Talley, Office of Administrative Hearings, State of California, in Sacramento, California, on August 16, 2011.

Claimant's foster mother represented claimant.

Robin Black, Legal Services Specialist, represented the service agency, Alta California Regional Center (ACRC).

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUES

Is claimant eligible for regional center services because: 1) he suffers from a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, or 2) he suffers from autism?

FACTUAL FINDINGS

1. Claimant is a 19 -year-old man who is lives with his foster family. He had an unstable home life during his early years and was removed from his birth mother's care more

than once. He was eventually placed with his grandmother, but was finally removed from his grandmother's care and placed with his current foster family in 2009, at the age of 17.

2. Claimant was referred to ACRC for an assessment to determine eligibility for services in 2010. On January 11, 2011, ACRC sent a letter to claimant informing him that their Interdisciplinary (ID) Team had met to review his records to determine his eligibility for services. The team determined he did not have a developmental disability and therefore was not eligible for ACRC services. Included with the letter was a Notice of Proposed Action stating claimant is not eligible for ACRC services.

3. On February 7, 2011, claimant's foster mother filed a Fair Hearing Request on behalf of claimant, appealing ACRC's determination that claimant is not eligible for regional center services.

4. Under the Lanterman Act, ACRC accepts responsibility for providing services and supports for persons with developmental disabilities. A developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a)).

Claimant's representative believes claimant is eligible for regional center services under the fifth category and/or because he has autism. She does not contend that claimant is eligible for regional center services under any other category of disability.

Psychological Assessments and Testimony

5. Monica Silva, Ph.D., evaluated claimant on December 19, 2010, and testified at the hearing. Dr. Silva, an independent contractor for ACRC, has been a licensed psychologist since 1993 and her practice has focused on evaluating children for regional center eligibility for the last six years. She completes about 250 evaluations each year.

Dr. Silva was asked to evaluate claimant to determine whether he suffers from a developmental disability, including autism. Dr. Silva found that claimant does not have a developmental disability and specifically ruled out autism. She reviewed claimant's records in addition to conducting her own assessment of claimant. In addition, she interviewed claimant's foster parents, and his birth mother.

A review of claimant's school records showed testing that identified claimant as a student with low-average processing speed, average intelligence, and a history of speech articulation difficulties. The school district found him eligible for special education under the eligibility categories of Specific Learning Disability (SLD) and Speech and Language Impairment (SLI), non-severe. Although the school district made a referral to County Mental

Health for eligibility for mental health services as part of claimant's special education program in May of 2009, the expanded Individualized Education Program (IEP) team, including staff from County Mental Health, after reviewing the May 2009 assessment, found claimant was not eligible for those services and was not a student who suffers from emotional disturbance.

Dr. Silva described claimant as a "kind-hearted, sensitive, likeable, and personable" bright young man. She said he was initially anxious when she met him, but she was able to establish rapport and claimant's anxiety decreased significantly. She found that his rate of speech was slower than usual, and he was taking time to think about his answers when she asked him questions.

Dr. Silva administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). This test consists of a series of 14 subtests that evaluate an array of intellectual abilities. A minimum of 11 subtests must be completed to compute each of the Composite and Full Scale scores. There are four Composite Index Scales: Verbal Comprehension, Perceptual Organization, Working Memory and Processing Speed. The Verbal Comprehension scale measures verbal concept formulation, verbal reasoning and knowledge acquired from one's environment. The Perceptual Organization scale measures nonverbal abilities such as spatial processing, visual motor integration and fluid reasoning. The Working Memory scale measures a person's ability to retain information in memory for short periods of time (or short-term memory). The Processing Speed scale is a measure of an individual's speed of information processing and is related to mental capacity and the efficient use of working memory for higher order fluid tasks. On the Composite Index scales, the population mean is 100 and the standard deviation is 15. On the subtests, an average score is 10, with a standard deviation of 3 points. Claimant completed 10 subtests of the WAIS-IV and was found to have a Full Scale IQ of 95, which falls within the average range of intelligence.

To determine whether claimant suffers from autism, Dr. Silva used the Autism Diagnostic Observation Schedule (ADOS). The ADOS is a standardized, semi-structured, observation assessment tool that allows the examiner to observe and gather information regarding an individual's social behavior and communication in a variety of different social communicative situation. The results of Dr. Silva's administration of the ADOS are as follows:

Language and Communication: [Claimant] was found to be a talkative young man who seemed to welcome the opportunity to engage verbally with an unfamiliar adult. It was noted that initially, he demonstrated a fair amount of anxiety and primarily answered this examiner's questions. He politely asked if he could play with straws and also accepted a cup of tea from the examiner, which seemed to decrease his anxiety significantly and seemed to lead to a comfortable interaction which allowed him to express himself. [Claimant's] manner of expressing himself verbally was atypical. He demonstrated a slow rate of speech and delayed response style which made his speech similar to individuals who struggle with cognitive delays and verbal expression. This, however, was contrasted by a strong vocabulary and insight which denoted maturity and strong intellectual and

verbal abilities. The combination of these two factors, however, made his communication style seem idiosyncratic. He used sentences in a largely correct fashion, and there were no instances of echolalia or stereotyped or idiosyncratic use of phrases noted. His tone and rate of speech, however, was idiosyncratic, and it generally seemed as though it took an extended amount of time for [claimant] to formulate his thoughts into sentences, and he may then struggle with a slight stammer or hesitations when producing those verbally.

Reciprocal Social Interaction [Claimant] presented as a friendly and social adolescent who seemed to enjoy interacting with an unfamiliar adult, the opportunity to share verbally, and the individualized attention and unconditional regard afforded to him during the current evaluation///he began to make humorous statements which he coupled with humorous gestures, started using sarcasm in an appropriate fashion, and otherwise seemed highly at ease and comfortable interacting in a reciprocal fashion with an unfamiliar adults. His eye contact was found to be appropriate, and he directed humorous and frequent facial expressions to this examiner.

...[Claimant's] insight into social relationships was found to be appropriate. He presented as a young man who seems to value social relationships, and he talked about his friendship with [his foster parents] and their son and how difficult it has been for him throughout the years, as he has been bullied and teased due to his being "small and weak."

Dr. Silva found that claimant had a Communication score of 2 and a Reciprocal Social Interaction score of 2. The autism cutoff scores are 3 and 6 respectively, so Dr. Silva found that claimant does not have autism using the ADOS.

The ADOS were:

	Claimant's Score	Autism Cutoff	Autism Spectrum Cutoff
Communication Total	2	3	2
Reciprocal Social Interaction Total	2	6	4
Comm. + Social Interaction	4	10	7

The ADOS scores did not indicate that claimant has autism, as all scores fell below the autism cutoff scores.

Dr. Silva concluded that claimant does not suffer from autism using the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fourth Edition Text Revised (DSM-IV TR) definition of autism.

To have an autistic disorder, an individual must have: (1) qualitative impairments in social interaction; (2) at least one qualitative impairment in communication; and (3) and at least one restricted repetitive and stereotyped pattern of behavior, interest, or activity. There must be a total of at least six of these items. The impairments in social interaction and communication must be marked and sustained. An individual must also have delays or abnormal functioning, with an onset prior to three years, in social interaction, language as used in social communication, or symbolic or imaginative play. The three broad criteria are set forth below:

1) Section 299.00 of the DSM-IV TR requires that, to be diagnosed with autism, an individual must have a qualitative impairment in social interaction as manifested by at least two of the following items:

- (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction.
- (b) failure to develop peer relationships appropriate to developmental level
- (c) lack of spontaneous seeking to share enjoyment, interests, or achievements with other people...
- (d) lack of social or emotional reciprocity.

2) Section 299.00 of the DSM-IV TR requires that to be diagnosed with autism, an individual must have a qualitative impairment in communication as manifested by at least one of the following items:

- (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
- (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
- (c) stereotyped and repetitive use of language or idiosyncratic language
- (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to the developmental level.

3) Section 299.00 of the DSM-IV TR requires that to be diagnosed with autism, an individual must have restricted repetitive and stereotyped patterns of behavior, interests, and activities as manifested by at least one of the following items:

- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
- (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
- (c) stereotyped and repetitive motor mannerisms...
- (d) persistent preoccupation with parts of objects.

Dr. Silva found that claimant had significant impairments in only one of the 12 criteria: encompassing preoccupation with one or more stereotyped and restrictive patterns of interest that is abnormal either in intensity or focus. To be diagnosed with autism, an individual must meet six criteria.

Dr. Silva noted that claimant's foster parents are very concerned about claimant's adaptive living skills and lack of self-direction. Dr. Silva asked claimant's foster parents to complete the Adaptive Behavior Assessment System, Second Edition (ABAS-II). The ABAS-II is a standardized instrument of adaptive functioning. The focus of this instrument is on the functions an individual actually performs without the assistance of others. Composite scores have a mean of 100 and a standard deviation of 15. Individuals with scores of 85-115 represent skills in the average range. Claimant's foster parents rated him as follows:

<u>GAC and Domain Composite Scores</u>	<u>Standard Score</u>	<u>Percentile Rank</u>
General Adaptive Composite	47	<0.1
Conceptual	55	0.1
Social	58	0.3
Practical	46	<0.1

Dr. Silva noted that claimant's foster parents expressed great concern for claimant and they specifically worry about his adaptive skills. These concerns are reflected in the ABAS-II scores that result from the foster parents' rating of claimant's adaptive and daily living skills. Dr. Silva noted that claimant's unusual upbringing, where he was not given much opportunity to practice independence while growing up, probably contribute to a lack of adaptive skills as a young man. She was told that claimant's grandmother doted on claimant and developed an "enmeshed" relationship with him. She allowed claimant to stay home from school often and spend the majority of many days watching television and/or playing videogames. He was not

given the typical opportunities that children are given to acquire new daily living skills. This likely contributed to his lack of adaptive skills today.

6. Stan Gamba, Intake Coordinator at ACRC testified at hearing. In his role as Intake Counselor, he conducted a Social Assessment of claimant on November 10, 2010. He met with and interviewed claimant. He observed that claimant did not demonstrate any repetitive motor or stereotypical characteristics throughout the social assessment. Mr. Gamba documented the concerns expressed by claimant's foster family regarding claimant's adaptive skills. At the time of the social assessment, claimant was planning to graduate from high school at the end of the 2010-2011 school year. Claimant graduated in June 2011. Mr. Gamba facilitated obtaining the evaluation completed by Dr. Silva. Mr. Gamba indicated that the eligibility team met, evaluated all information available to them, including the Social Assessment, Dr. Silva's assessment, and medical and school records, and found that claimant does not have a developmental disability and therefore is not eligible for regional center services and supports.

7. Phyllis Magnani, Ph.D., Staff Psychologist at ACRC, testified at hearing. Dr. Phyllis Magnani was a member of the eligibility team that reviewed claimant's records and determined he does not have a developmental disability. Dr. Phyllis Magnani had not met claimant prior to the eligibility team's decision, but indicated that she reviewed his records. She stated that there were many reasons the team concluded claimant does not have autism or a developmental disability similar to or needing treatment closely related to mental retardation. The eligibility team relied on school records and Dr. Silva's assessment, which included the ADOS, in concluding that claimant does not have autism. The eligibility team relied on Dr. Silva's assessment and school and court records in concluding that claimant does not suffer from a developmental disability closely related to mental retardation or need treatment similar to that needed by people with mental retardation. Claimant's current IQ scores fall within the average range. Typically, a person with a condition similar to mental retardation will have "global deficits." While claimant's working memory scores were lower than other scores on his WAIS-IV, his full scale IQ is 95, placing him in the average range. She believes claimant needs treatment for anxiety, which would not be similar to the treatment given to people with mental retardation. People with mental retardation need a lot of repetition of instruction. Anxiety may be treated with appropriate cognitive behavioral therapy and/or medication.

8. Leonard Louis Magnani, M.D., Ph.D, Medical Director at ACRC, testified at hearing. Dr. Leonard Louis Magnani stated that he was also a member of the eligibility team and agreed with the conclusion that claimant is not eligible for ACRC services. Dr. Leonard Louis Magnani testified that he had reviewed claimant's records, including an MRI of claimant's brain, which showed no abnormalities.

9. Ted Jonas, claimant's Court Appointed Special Advocate (CASA), testified at hearing. Mr. Jonas has knows claimant since he began working with him in 2009 and acts as a friend and mentor to claimant. He believes claimant is often confused about situations. For example, when claimant decided to buy a laptop, Mr. Jonas took him to the store. He stated they made about three or four trips to the store in order to finally decide on a laptop to buy.

Claimant had to ask his foster mother what he needed to ask store personnel in order to make the purchase. When Mr. Jonas takes claimant out to eat, he makes sure claimant orders his food first. If Mr. Jonas orders first, claimant simply orders the same food Mr. Jonas ordered. Mr. Jonas acknowledged that claimant can ride a bicycle but doubts that he will ever be able to drive because he is very inflexible about the rules of the road and fears that, when another driver does not obey the rules of the road, claimant will not respond appropriately or safely. Mr. Jonas knows a child with autism and believes claimant has similar characteristics to that child.

10. Claimant's foster father testified at hearing. He is extremely concerned about claimant's inability to care for himself. He testified that he has to help claimant with tasks of everyday living such as cooking, showering, combing his hair, and the amount of soap to use in the shower. He said having claimant as a member of the family takes more time and energy than having a 14-month-old daughter. He stated that claimant functions very similarly to his sister-in-law who has Down Syndrome. Safety is also a concern. Claimant's foster father stated that claimant let a census worker enter the house and gave the census worker a lot of information about the family but did not tell other family members he had done so. He expressed concerns about claimant's inability to understand money, to take any initiative or make good decisions.

11. Robert S., claimant's foster brother testified at hearing. Robert said he had known claimant since third grade, when he noticed him on the school playground as a "kid all by himself." He befriended claimant and spent many school years defending him from other students. Claimant was very awkward throughout school and "had to be defended." Robert testified that he had always felt claimant's grandmother was manipulating him and that once claimant left the environment of his grandmother's house, he would be "normal." In 2009, claimant moved in with his foster family and after that, Robert realized the problems claimant has are not caused solely by his living situation. Robert testified that sometimes claimant gets very upset when he does not get his way and he even broke his own laptop in a fit of anger. He also testified that his mother seems, "more stressed out than ever," having claimant live in their family home.

12. Claimant's foster mother testified that claimant may test well, but, in many ways, her sister with Down Syndrome is "smarter" than claimant. He is unable to make a peanut butter and jelly sandwich on his own. He can ride a bike, but it "takes forever." A trip that should be a five-minute ride takes claimant 20 minutes to complete. She testified that, because claimant is a foster youth, he is eligible for vocational rehabilitation services from the Department of Rehabilitation until he is 21 years old. She is concerned that, given his low adaptive skills, she may not be able to keep him in her home past that time without more help.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for providing services and supports for persons with developmental disabilities and an obligation to help them, which it must discharge. (Welf. & Inst. Code, § 4501.) As defined in the act, a

developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the “fifth category” – a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a)).

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54001, subd. (c).)

2. “Substantial handicap” is defined by regulations to mean “a condition which results in major impairment of cognitive and/or social functioning.” (Cal. Code Regs., tit 17, § 54001, subd. (a).) Because an individual’s cognitive and/or social functioning is multifaceted, regulations provide that the existence of a major impairment shall be determined through an assessment that addresses aspects of functioning including, but not limited to: (1) communication skills; (2) learning; (3) self-care; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 540001, subd. (b).).

3. A preponderance of the evidence supports ACRC’s findings that claimant does not have autism, nor does he suffer from a condition closely related to mental retardation or requiring treatment similar to that required by people with mental retardation.

4. No evidence was offered that claimant suffers from mental retardation, cerebral palsy, or epilepsy.

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ORDER

Claimant's appeal from ACRC's decision that claimant is not eligible for regional center supports and services under the Lanterman Act is denied.

DATED: August 30, 2011

ELAINE H. TALLEY
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd.(a).)